INDEX

	Page
Previous opinions and orders	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	8
Conclusion	14
Appendix	15

CITATIONS

Cases:

Crews v. *Commissioner*, 120 F. 2d 749, certiorari denied, 314 U.S. 664	10
Denholm & McKay Co. v. *Commissioner*, 132 F. 2d 243	11
Hazel-Atlas Co. v. *Hartford Co.*, 322 U.S. 238	7, 10, 11, 12, 13
Helvering v. *Northern Coal Co.*, 293 U.S. 191	9
McCarthy v. *Commissioner*, 139 F. 2d 20	10
Merrill v. *United States*, 152 F. 2d 74	10
Monjar v. *Commissioner*, 140 F. 2d 263	10
Old Colony Tr. Co. v. *Commissioner*, 279 U.S. 716	10
Rothensies v. *Electric Battery Co.*, 329 U.S. 296	11, 13
Simpson, R., & Co. v. *Commissioner*, 321 U.S. 225	9, 10
Swall v. *Commissioner*, 122 F. 2d 324	10
Sweet v. *Commissioner*, 120 F. 2d 77	10
Taylor v. *Commissioner*, 76 F. 2d 904, certiorari denied, 296 U. S. 594, rehearing denied, 296 U.S. 662	4, 9, 10, 12
Taylor v. *Commissioner*, 324 U.S. 871	5, 12
Taylor v. *Marcelle*, 97 F. Supp. 35	12
Toledo Co. v. *Computing Co.*, 261 U.S. 399	13
United States v. *Throckmorton*, 98 U.S. 61	13
White's Will v. *Commissioner*, 142 F. 2d 746	10

Statutes:

Internal Revenue Code, Sec. 1140 (26 U.S.C., 1946 ed., Sec. 1140)	8, 10, 15
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 1005	8

Miscellaneous:

Federal Rules of Civil Procedure, Rule 60(b)	12
S. Rep. No. 52, 69th Cong., 1st Sess., pp. 37-38 (1939-1 Cum. Bull. (Part 2) 332, 360)	9

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 114

WINTHROP TAYLOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PREVIOUS OPINIONS AND ORDERS

The memorandum opinion of the Board of Tax Appeals in the original proceeding, dated June 15, 1934, is unreported, but may be found in 1934 P-H B.T.A. Memorandum Decisions, par. 34,310. The opinion of the court below, dated April 15, 1935, affirming the decision of the Board, is reported in 76 F. 2d 904. The order of this Court, dated October 14, 1935, denying taxpayer's petition for a writ of certiorari to review this decision of the court below, is reported in 296 U.S. 594, and

the order of this Court, dated November 11, 1935, denying taxpayer's petition for rehearing of the petition for a writ of certiorari, is reported in 296 U.S. 662.

The *per curiam* denial by the court below, dated December 26, 1944, of taxpayer's petition to review its judgment and decree of April 22, 1935, affirming the decision of the Board, was made without opinion and is not reported. The order of this Court, dated April 9, 1945, denying taxpayer's petition for a writ of certiorari to review this decision of the court below, is reported in 324 U.S. 871.

The *per curiam* opinion of the Court of Appeals below, as amended March 18, 1952, denying taxpayer's second motion to review and set aside its prior order (R. 27), is reported in 194 F. 2d 528.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1952 (R. 21), and taxpayer's petition for rehearing was denied on March 18, 1952 (R. 27). The petition for a writ of certiorari was filed on June 10, 1952. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to entertain taxpayer's second petition to review and vacate its judgment filed April 22, 1935, affirming the decision of the Board of Tax Appeals, in view of the provisions of Section 1140 of the Internal

Revenue Code and in view of the expiration of the term at which the judgment was entered.

2. Whether the court below, if it had jurisdiction, properly denied the petition for review in the exercise of its discretion.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code are printed in the Appendix, *infra*, pp. 15-17.

STATEMENT

This proceeding involves a second application by taxpayer to have the court below set aside its decision and decree of April 22, 1935, affirming a deficiency in taxpayer's income tax for the year 1929 as determined by the Board of Tax Appeals. (R. 2, 18, 27.) The deficiency for the year 1929, as affirmed by that decision, was in the amount of $51,353.70. (R. 2.) Taxpayer seeks to have the deficiency reduced to the sum of $5,319.89. (R. 18, 27.)

The deficiency relates to the treatment of a gain of $490,006.67, resulting from the sale of 14,000 shares of stock of the Public Service Corporation of New Jersey. The 14,000 shares were part of a larger quantity of 35,000 shares which taxpayer had sold. (R. 5.) In his income tax return for 1929, taxpayer reported the $490,006.67 as a capital net gain, on which he paid tax at a rate of 12½%. The Commissioner determined that that sum should be treated as ordinary income. (R. 3.)

The questions raised by the deficiency assessment and litigated before the Board of Tax Appeals and the Court of Appeals were (1) whether the 14,000 shares in question were held primarily for sale in the course of trade or business, and (2) if not, whether they were held as capital assets for more than two years. (R. 5.) The court below, in its opinion rendered on April 15, 1935 (*Taylor* v. *Commissioner,* 76 F. 2d 904), ruled against taxpayer on the second ground, and on April 22, 1935, entered judgment affirming the order of the Board of Tax Appeals dated June 15, 1934, redetermining in the sum of $51,353.70 the deficiency found by the Commissioner. On April 29, 1935, the court below denied petition for rehearing. This Court, on October 14, 1935, denied taxpayer's petition for certiorari (*Taylor* v. *Commissioner,* 296 U.S. 594), and, on November 11, 1935, denied taxpayer's petition for rehearing (296 U.S. 662). (R. 5.)

Thereafter, taxpayer applied to the Department of Justice for further review of the case. On August 8, 1939, the Department of Justice advised taxpayer that in view of the decree of the court below, affirming the order of the Board of Tax Appeals, neither the Attorney General nor the Secretary of the Treasury, nor both acting in conjunction, had any power to remit the deficiency. (R. 5-6.)

Subsequently, taxpayer alleges, he discovered, as a result of search, the original purchase and sales

tickets covering the 21,000 additional shares of Public Service stock and submitted the record of the purchases and sales covering the entire 35,000 shares sold to the Bureau of Internal Revenue in conjunction with an offer in compromise. He further alleges that on October 17, 1944, the Treasury Department, in a written report, recomputed the 1929 tax deficiency to be $5,319.89, but rejected the offer in compromise and notified taxpayer that in view of the judgment of the court below the Treasury Department had no authority to compromise a tax legally due for an amount less than could be collected. (R. 6.)

In December, 1944, taxpayer filed in the Court of Appeals below a first petition for review of its decree of April 22, 1935, praying that the court below vacate and set it aside on the basis of the record of the purchases and sales of the entire 35,000 shares, and alleging that this evidence confirmed that the 14,000 shares had been held for more than two years prior to sale. The Commissioner's answer requested dismissal of the petition on the ground that the court was without jurisdiction to review its prior decree. The court below denied taxpayer's petition without opinion on December 26, 1944. Thereafter, on April 9, 1945 (*Taylor* v. *Commissioner,* 324 U.S. 871), this Court denied taxpayer's petition for certiorari to review this decision. (R. 6.)

After the denials, taxpayer paid under protest to the Collector of Internal Revenue the entire de-

ficiency in income tax for the year 1929, including interest, as follows (R. 7):

July 17, 1945	$14,034.33
December 5, 1945	51,353.70
December 26, 1945	9,454.09
December 27, 1946	15,000.00
December 15, 1947	19,000.00

aggregating $108,842.12.

On or about July 12, 1949, taxpayer commenced

~~On January 10, 1952, taxpayer filed in the court~~ an action in the United States District Court for the Eastern District of New York against Joseph P. Marcelle, the Collector to whom he had made the tax payments, for refund of the difference between the total amount of $108,842.12 and the sum of $5,319.89. (R. 7-8.) In this action the district court granted the defendant's motion for summary judgment, based on the ground of *res judicata,* and dismissed taxpayer's complaint on February 23, 1951. (R. 9, 12-14.) Taxpayer has appealed to the court below from this decision of the district court and his appeal is now pending. (R. 9.)

On January 10, 1952, taxpayer filed in the court below the present petition for review of its decree of April 22, 1935. In this second petition, taxpayer alleges (R. 6-7) that when he filed his first petition for review in December, 1944, he was not aware of the fact that the Department of Justice, in a memorandum addressed to the Treasury Department on January 19, 1939, in connection with his application pending at that time for review of his case by the Department of Justice, had stated that

"We find the petitioner in good conscience to be entitled to relief", that the case was one "in which relief ought to be afforded", and (R. 7)—

> that it was due to the erroneous insistence of the representatives of the Government that the taxpayer had not established that he had held the stock in question for more than two years prior to sale which led the Board into making, and the Court into sustaining, a fundamental erroneous deficiency determination.

Taxpayer further alleges that he was likewise not aware at the time he filed his petition for review in the court below in 1944, that on October 17, 1944, the Treasury Department, in a written report upon the basis of the purchases and sales records of the entire 35,000 shares, made in connection with his offer of compromise, had computed the tax deficiency to be $5,319.89. (R. 7.)

In his present petition for review, taxpayer alleges that, if the decision of the district court in the refund suit is correct, he cannot obtain relief so long as that 1935 judgment of the court below stands. He invokes the decision of this Court in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, as authorizing relief here after the expiration of the term at which the judgment of the court below was entered. (R. 9-10.) He accordingly requests that the court below set aside its decision and decree of April 22, 1935, and make an order redetermining the amount of deficiency in taxpayer's income tax for the year 1929 to the sum of $5,319.89. (R. 10.)

The Commissioner moved to dismiss the petition on the ground that the court below was without jurisdiction to review its 1935 decree. (R. 19-20.) The court below denied taxpayer's petition (R. 20-21), and held moot the Commissioner's motion to dismiss (R. 22). The court below also denied taxpayer's petition for a rehearing (R. 24-26) by an order which at the same time amended its per curiam opinion, (R. 27).

In its opinion, the court below pointed out that in 1944 it denied a similar motion in which the same facts were presented to the court in respect to the purchases and sales. It said that the only new proof offered was "an intermural memorandum by someone in the Department of Justice to the Treasury Department in 1939, and a recomputation of the petitioner's income tax by the Treasury Department in 1944." This proof, the court below concluded, could afford no basis for disregarding its earlier decision. (R. 27.)

ARGUMENT

1. By decisions of this Court and numerous decisions of the courts of appeals it is well settled that pursuant to Section 1140 of the Internal Revenue Code (Appendix, *infra,* pp. 15-17), decisions of the Board become "final" at the times specified, without the qualifications which may exist in regard to ordinary judgments. The section was originally adopted as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Its purpose and effect are expressed in the committee report which recom-

mended its adoption (S. Rep. No. 52, 69th Cong., 1st Sess., pp. 37-38 (1939-1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

The explicit requirement of the statute deprives the court of its jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment even during the term at which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Similarly, we believe, the court below was without jurisdiction to review for any reason its own order and the decision of the Board, more than sixteen years after denial by this Court of a petition for certiorari (October 14, 1935, 296 U.S. 594) and of

a petition for rehearing on the petition for certiorari (November 11, 1935, 296 U.S. 662), which the statute specifies as an action that renders the decision of the Board final. Internal Revenue Code, Section 1140 (b)(2) (Appendix, *infra*, p. 15); *R. Simpson & Co.* v. *Commissioner, supra.* In *Sweet* v. *Commissioner,* 120 F. 2d 77, 81 (C.A. 1st), the court said:

> From a reading of § 1005 [of the Revenue Act of 1926, identical with Section 1140 of the Internal Revenue Code] as a whole it is apparent that the old chancery practice with reference to bills of review has no place in the statutory scheme regulating the procedure for adjudicating tax disputes instituted before the Board of Tax Appeals.

To the same effect are *Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716, 726, 727; *Crews* v. *Commissioner,* 120 F. 2d 749 (C.A. 10th), certiorari denied, 314 U.S. 664; *Swall* v. *Commissioner,* 122 F. 2d 324 (C.A. 9th); *McCarthy* v. *Commissioner,* 139 F. 2d 20 (C.A. 7th); *Monjar* v. *Commissioner,* 140 F. 2d 263 (C.A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746 (C.A. 3d); see also *Merrill* v. *United States,* 152 F. 2d 74 (C.A. 2d).

For this reason, *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238, upon which taxpayer relies (R. 9; Pet. 2; Br. 12-14), does not apply. In that case there was no statute limiting jurisdiction to review. Here, Congress has chosen to fix irrevocably the termination of tax controversies at the times spe-

cifically prescribed. These statutory limits may not be disregarded upon petition for review.

In *Rothensies* v. *Electric Battery Co.*, 329 U. S. 296, this Court observed (pp. 301, 302, 303)—

> a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.
>
> * * * * *
>
> As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out.
>
> * * * * *
>
> If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them.

See *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243 (C.A. 1).

2. Even apart from the statute, the court below, upon well-settled principles, was without power to entertain this second petition for review of its 1935 judgment. Unlike *Hazel-Atlas Co.* v. *Hartford Co., supra*, p. 244, this is not a case of "after-discovered fraud", or anything comparable thereto. The asserted errors consist in the court's decision that the stock involved had not been held for two years. The most that can be said is that taxpayer has subsequently submitted evidence, which was at all times available to him, which if submitted at

the original proceeding might have led to the opposite conclusion. Whether or not that evidence was of a character which would, in an ordinary civil proceeding, have supported a motion for new trial on the ground of newly discovered evidence filed within one year after the judgment (Rule 60(b)(2), F.R.C.P.), it certainly would not, under the usual rules, support a bill of review 16 years later.

The questions on which petitioner asserts error were fully litigated in the original proceedings as shown by the opinion of the Court of Appeals (*Taylor* v. *Commissioner, supra,* 76 F. 2d 904), and as noted by Judge Kennedy in his opinion in *Taylor* v. *Marcelle,* 97 F. Supp. 35 (E.D.N.Y.) (R. 12-14). The same errors here alleged were urged before the Board, in the argument to the Court of Appeals, in the petition to that court for rehearing and in the petitions for certiorari and for rehearing filed in this Court in 1935. Moreover, the *Hazel-Atlas Co.* case was invoked by taxpayer in his first petition for review in 1944, which presented the same facts as are presented here in respect to purchases and sales. Taxpayer's petition for certiorari to review that order of the court below, which relied primarily upon the *Hazel-Atlas Co.* case, was denied by this Court in 1945. (324 U. S. 871.) The only new proof now offered is an intermural memorandum of January, 1939, by someone in the Department of Justice to the Treasury Department, and a recomputation of taxpayer's income tax by the Treasury Department in 1944. (R. 6-7.) But taxpayer also states that he was informed by the

Department of Justice on August 8, 1939, that in view of the decree of the court below no power existed in the Attorney General or the Secretary of the Treasury to grant remission of the deficiency. (R. 5-6.) In any event, nothing in *Hazel-Atlas Co.* v. *Hartford Co., supra,* holds that many years after a judgment has become final the court has power to review matters which were in issue and were fully disposed of by the judgment, merely on the ground that they were incorrectly decided, or that the losing party had failed to present evidence which might have produced a different decision. If such a power existed, litigation would never end. No such power exists. *United States* v. *Throckmorton,* 98 U. S. 61, 65-69; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 423-424.

3. Even if the court below were deemed to have power to grant the review sought, it committed no abuse of discretion in denying the petition. Incalculable confusion would result from the reopening of old tax cases merely because it was asserted that questions had been decided incorrectly many years before, when no claim of corruption or fraud is involved. *Rothensies* v. *Electric Battery Co., supra.* Especially is this true on a record such as here, where more than seven years ago a previous petition for review based on substantially the same grounds was considered and denied by the court below and certiorari denied by this Court.

CONCLUSION

The decision below is clearly correct, and there is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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I. HENRY KUTZ,
Special Assistant to the Attorney General.

JULY 1952.

Internal Revenue Code:

SEC. 1140. Date when Board decision becomes final.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed on Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the petition for the Board has been affirmed or the decision of the Board has been affirmed or the review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—If

(1) *Upon mandate of Supreme Court.*—the decision of the Supreme Court directs that the

the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing; and if (1) the time allowed for filing a petition for certiorari has expired, and

no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) *Definitions.*—As used in this section—

(1) *Circuit Court of Appeals.*—The term "Circuit Court of Appeals" includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.* — The term "mandate", in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(26 U.S.C., 1946 ed., Sec. 1140.)

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